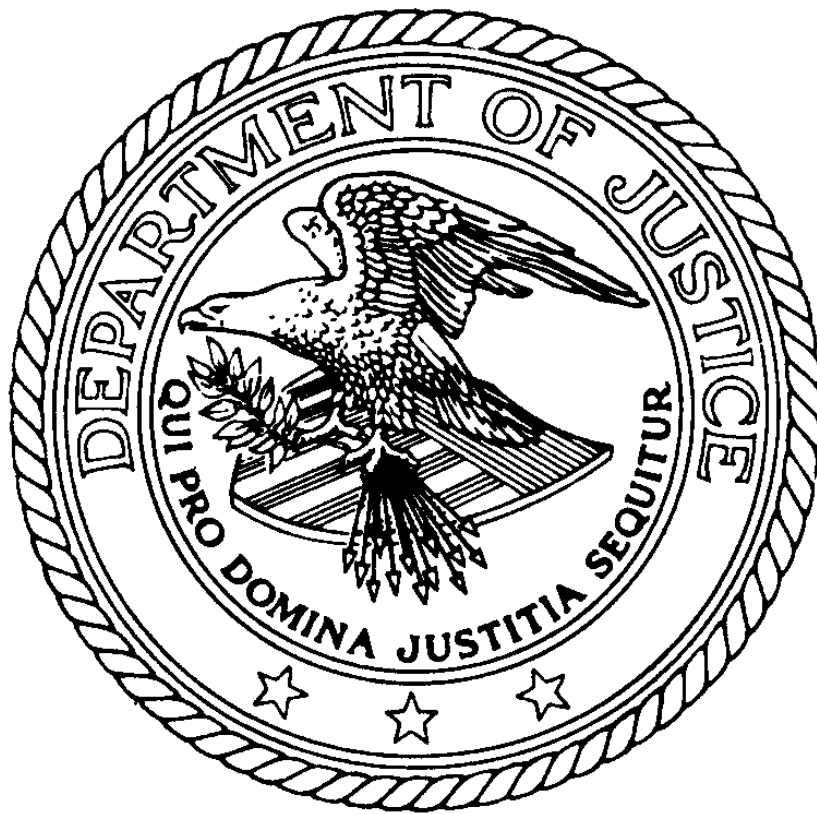


**TAX DIVISION**

**GUIDANCE ON**

**EXPERT WITNESS CONTRACTS**



revised October, 2008

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# **Tax Division Guidance on Expert Witness Contracts**

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## 1. Introduction

These instructions are intended to guide the trial attorney through the process of obtaining a valid expert witness contract. Additional information is contained in Chapters 1 through 6 of Justice Management Division's "Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation."

Expert witnesses hired on behalf of the Department of Justice are paid from Department funds – the Fees and Expenses of Witnesses (FEW) appropriation.<sup>1</sup> Each component, including the Tax Division, submits an annual request to the Department for FEW funds; these requests are completely separate from the components' annual budgets. The Department closely monitors the components' compliance with the restrictions on using FEW funds. These restrictions include, most importantly, the requirement that the expert witness must be hired to testify on behalf of the Government.<sup>2</sup> *A person who is hired as a non-testifying expert cannot be paid out of the FEW appropriation, but is a litigative consultant who must be paid out of the Tax Division's annual budget.*<sup>3</sup>

## 2. Importance of Obtaining a Contract

Before an expert performs any billable work, there must be a valid signed contract between the expert and the Tax Division. Obtaining a valid contract protects the Government's interests, and also protects the trial attorney from personal liability. *An attorney who allows an expert to perform work before a contracting officer has signed the contract, has created an unauthorized commitment, which could result in the attorney being held personally liable to pay the expert for any work performed that was not covered by a contract.*

The only person authorized to sign a contract obligating the Government is a contracting officer, who is responsible for ensuring compliance with all requirements of federal contracting law, including federal statutes and regulations, executive orders, and internal policies and procedures. The Tax Division's contracting officer for expert witness contracts works in Procurement, within the Division's Office of Management and Administration (OMA).

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<sup>1</sup> The FEW appropriation is also used to pay fees and allowances to fact witnesses.

<sup>2</sup> An expert who is hired as a testifying witness, but who does not testify because the case settles or is resolved on summary judgment, may still be paid from FEW funds.

<sup>3</sup> A mediator is the single exception to the rule that, to be paid out of FEW funds, an expert witness must be hired to testify. See Section 6, *infra*.

### 3. Overview of the Approval Process

After identifying an expert, the trial attorney must complete and send to OMA a request package containing all required forms. (Completing the request package is discussed more fully in Section 5, *infra*.)

*Approval time.* The trial attorney should allow two weeks for approval, if the expert witness contract must be approved only by OMA, and four weeks if the contract requires approval by the Office of the Assistant Attorney General (OAAG) and/or a Department procurement official.

*Department authorization.* The Department's Justice Management Division (JMD) requires that its procurement staff review and approve all expert witness requests above \$100,000. *Dollar amounts for an expert in a single case are cumulative, even if contained in separate requests.*

*OAAG review and authorization.* The OAAG reviews and approves all expert witness requests that require Department authorization (*i.e.*, over \$100,000), as well as the following, regardless of amount:

- if the requesting official is not a section chief
- all contract ratifications
- whenever total payments to a single expert (under one contract or under several contracts) appear to represent a large percentage of the expert's business or a large absolute dollar figure

If OAAG approval is required, OMA will, after its initial review,<sup>4</sup> forward the request to the appropriate Deputy Assistant Attorney General for review and approval.

*Funding approval and award.* After OAAG approval is received, the OMA Budget Officer reviews the request and authorizes funding approval. If any information is missing or unclear, OMA will contact the trial attorney. If the request is for \$100,000 or less, OMA – after reviewing to ensure that Government contracting requirements are met – awards the contract; if over \$100,000 is requested, the contract is sent to JMD for awarding.

*Notifying expert and trial attorney of contract award.* Once the contract has been awarded, OMA will send the contract to the expert to sign and return so that work can begin on the contract. OMA will notify the trial attorney by email once a contract has been awarded, and

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<sup>4</sup> OMA conducts an initial review to ensure that the request contains all required documentation and that there are sufficient funds remaining in the Division's expert witness allotment. OMA also enters certain information into the Expert Witness module in TaxDoc. OMA takes no further steps until OAAG approval is received.

will also email the trial attorney a complete copy of all required signed documents.<sup>5</sup> OMA will also provide the expert a copy of the signed contract and the signed Statement of Work.

#### **4. Vetting Prospective Experts for Conflicts**

The only conflict-of-interest provision in the contract documents is on the second page of the contract form (OBD-47): “The Contractor also certifies that, to the best of its knowledge, there is nothing derogatory in the background of its employees that could impugn testimony given by these employees or work products delivered by the Contractor.” It is the trial attorney’s responsibility to flesh out this bare-bones language, by questioning prospective experts about such matters as:

- prior expert witness engagements (including engagements in which the expert was retained, but did not testify)
- whether a court has ever excluded the expert from testifying
- any civil lawsuits to which the expert has been a party
- the amount and percentage of the expert’s income that is derived from government contracts
- whether the expert has ever been under criminal investigation or indictment for, or been convicted of or pled guilty to, any crime or misdemeanor
- whether any civil penalties have been assessed against the expert
- whether the expert has any unpaid liabilities to the federal government
- whether the expert has timely filed all required tax forms within the past three years

Questions about conflicts should be addressed in the first instance to the trial attorney’s chief or assistant chiefs before being elevated to the Division’s Ethics Officer.

#### **5. Required Forms**

To request an expert witness, the trial attorney must complete and submit to Finance paper originals of the six documents described below.<sup>6</sup> *OMA may summarily return an incomplete package to the trial attorney without action.*

The forms are generated using TaxDoc, which has been programmed to automatically fill in some of the case-specific data fields, as well as to automatically total the estimated expenses

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<sup>5</sup> After the contract is awarded, OMA updates TaxDoc and obligates the contract, so that the Division knows how much of its expert witness budget remains available.

<sup>6</sup> At this time, JMD requires all contract documents to be submitted in paper format. The Division is working with JMD to allow electronic document submission.

(once the trial attorney fills in the required cost-data fields).<sup>7</sup> For reference purposes only, these documents are also available, in pdf, non-fillable format, on the Division's Document Management System, in the Expert Witness folder in the "Forms" workspace.

- 5.1. **Checklist** - This document should be the top document in the package. It lists all the forms that must be submitted.
- 5.2. **Form OBD-47 - Request, Authorization, and Contract for Services of Expert Witness, Litigative Consultant, or ADR Neutral** - This form is used by all Department of Justice components. The Department's line-by-line instructions for this form are contained in **Form OBD-47B**.<sup>8</sup> In addition to those instructions, the following table contains information that trial attorneys may find helpful.

Item(s)	Instructions for Form OBD-47
2	The chief of the trial section in which the case originated is the "requesting official" (even if the case is being handled by a senior litigation counsel) and must sign the form before it is forwarded for approval.
3	"Point of Contact" is the trial attorney assigned to the case.
9 - 12	"Contractor" is the expert whose services are being retained.
13	For an expert witness request, the correct box will be 13.a. - Expert Testimony on Behalf of the U.S.  For a mediator/ADR neutral, the correct box is 13.f.  (See separate instructions for retaining litigative consultant services if you are retaining someone to help with the case, but who is not intended to testify. Litigative consultants are paid from Division funds.)

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<sup>7</sup> Expert witness documents may be generated for any case by opening the case on TaxDoc, left-clicking the "case related forms" button on the lower right-hand side of the screen, and selecting the appropriate button ("New Expert Witness Contract Form - OBD47"; "MOD Existing Expert Witness Contract Form"; or "Expert Witness Justification Package" (containing all remaining documents except the OBD-47 and OBD-47MOD)).

<sup>8</sup> The additional government-mandated clauses to which the expert is agreeing are contained in OBD-47 (Clauses).



14	<p>Use your – and your expert’s – best judgment to estimate the time and money required for each activity for the entire duration of the case. Do not merely estimate the time and money for that portion of the case currently being funded. An overly conservative estimate will likely lead to more work later when modifications must be justified and approved. Dates must include month, day, and year.</p> <p>For a mediator/ADR neutral, fill in only box 14.e., not 14.a.-d. The itemized expenses should include only the Government’s portion of the fee.</p>
Parts II and III	OMA will complete.

Expert witnesses **are subject to federal travel regulations** and may not be reimbursed for expenses that do not comport with those regulations (for example, for premium air travel). Please be sure that the expert is familiar with this requirement. While experts may be reimbursed for the time they spend traveling, the expert’s rate for traveling time must be included in the contract *and* the request must include documentation that charging for travel time is the expert’s customary practice.

5.3. **Statement of Work (“SOW”)** - This document is part of the contract. (See OBD-47, section III(3).) The Statement of Work defines the expert’s responsibilities and must, therefore, be as complete and detailed as possible; it includes a statement of the work to be performed and such other details as identification of key personnel, period of performance, required reports to be delivered, and invoicing procedures. The expert must sign this document as an acknowledgment that the expert proposes to complete the work according to the terms stated. The following reminders are included on the form, but their importance bears repeating here:

- Invoices must be submitted no later than 30 days after performance or receipt of services.
- Include criteria defining under what conditions the expert would be expected to notify the trial attorney that the original costs estimated in the existing contract are in danger of being exceeded.
- If funding is exceeded, work must cease immediately until a contracting officer authorizes a modification.

- If the performance period of the contract is exceeded, work must cease immediately until a contracting officer authorizes a modification.

As a general rule, the trial attorney conducts preliminary discussions with several proposed experts. After evaluating the experts' fees, qualifications, and other factors, the trial attorney, after consultation with the section chief or assistant chiefs, will preliminarily select an expert. Based upon prior discussions with the proposed expert, the trial attorney will draft the proposed Statement of Work and provide it to the proposed expert to review and make any necessary adjustments. The expert will sign the document as his or her technical and price proposal, and return it to the trial attorney.

- 5.4. **Explanation and Justification for Retaining Expert Witness.** This document explains why the Tax Division should retain an expert witness for this case. It may include information protected by 26 U.S.C. § 6103 or other privilege. After the request is approved and a contract is established, OMA will return this form to the trial attorney for retention. ***This is a document internal to the Tax Division and should never be shared with the expert witness.***

Each of the four areas listed in this document need to be addressed. The "Description of Work" should not simply repeat the information provided in the Statement of Work, but should include any additional information that may explain the Government's need for the expert.

If the attorney expects to retain more than one expert witness for the case, the attorney should discuss in this document who the other experts are (if already identified), and how the work of all the experts will be integrated together as part of the overall litigation strategy.

If the attorney is seeking to hire a mediator/ADR neutral, the justification should explain how the case conforms to the Division's ADR guidelines. (See [Tax Division Memorandum on ADR](#) and [Tax Division ADR Case Selection Criteria](#).)

- 5.5. **Justification for other than Full and Open Competition for Expert Witnesses ("JFOC").** Expert witness contracts are an exception to the general requirement that Government contracts may be awarded only after full and open competition. Although Section 611 of Public Law 102-140 authorizes the Department to retain expert witness services without competition, the file must contain a justification for restricting competition to a single source. The justification should also affirmatively determine price reasonableness of the expert's services. That determination is made in Section 6 of the JFOC. ***The JFOC is an internal document that should never be shared with the expert witness.***

Types of information relevant to establishing price reasonableness are described below:

- *Prevailing rates.* The rates charged by other similar types of experts in the same locality are one indication of the prevailing rate for the sort of expert witness service the Government is seeking. The trial attorney may have obtained that information while searching for an expert. Provide the name and contact information of those other experts, and the dates the information was obtained. In addition, TaxDoc contains information on the rates that the Tax Division has paid to expert witnesses in the past.<sup>9</sup> Information about what other experts charge, in and of itself, is not likely to be sufficient to establish price reasonableness of your expert because the prominence and reputation of a particular expert may affect the price that the Division is willing to pay. But rate information from TaxDoc may be useful if used in conjunction with other rate information. *The trial attorney's failure to include sufficient information about prevailing rates will delay contract approval, since OMA will need to conduct research to obtain such information.*
- *Specialized knowledge.* A particular expert's specialized knowledge of the issues in a case may justify paying a higher price.
- *Total cost.* The total cost to complete the job should be compared, not just the experts' hourly rates. For example, some experts have assistants, for whose time they charge a lower rate; or some experts may already have some knowledge of the facts and would require fewer hours to prepare an expert report. In those situations, the Government could save money by awarding the contract to an expert charging a higher hourly rate.
- *Prominence and Reputation.* The significance of the issues in a case may justify seeking out a prominent expert who charges more than prevailing rates.
- *Limited number of experts.* In some instances the number of experts in a particular subject may be very limited. An example of this might be when most of the available experts have a conflict of interest. When the number of available experts is small, and the Government's bargaining power correspondingly limited, the expert frequently charges more than the market rate.

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<sup>9</sup> To obtain a listing of experts in a particular field, click on "Experts" within the TaxDoc "Data" menu (which appears as the second item from the left in the topmost toolbar).

5.6. **Confidentiality and Security Certification.** This certification is made part of the Statement of Work, and therefore is also part of the contract. Submit this certification, signed by the expert, with your request. The certification explains the expert witness's obligations to

- safeguard and not improperly disclose information protected by 26 U.S.C. § 6103 or other privilege
- comply with Department of Justice computer data security requirements
- return all property of the United States at the end of the contract period

## **6. Hiring a Mediator or Alternative Dispute Resolution (ADR) Neutral**

The Department treats a mediator or ADR neutral as a special type of expert witness. Although mediators are not hired to testify, the Department allows mediators to be paid out of Department funds, in order to promote greater use of ADR. The Department's [Office of Dispute Resolution](#) (ODR) approves ADR funding for all litigating components.

Although ODR approval represents an additional level of Departmental review for hiring a mediator/ADR neutral, from the trial attorney's viewpoint the process is virtually unchanged. The trial attorney will use the same package of forms for hiring a mediator or ADR neutral as for hiring an ordinary expert witness. The minor differences in completing the forms are noted in Section 5, *supra*. The biggest single difference from a funding viewpoint, of course, is that the opposing side shares the cost of the mediator equally with the Government.

The trial attorney will forward the forms package to OMA for review, as is customary. OMA handles all contacts with ODR, and will forward the forms package to ODR. Once ODR approves funding, the Division handles the processing and payment of invoices as it would for any other expert witness.

The Tax Division Settlement Manual contains more information about hiring mediators.

## **7. Managing the Contract**

The trial attorney working with the expert is responsible for monitoring the expert contract with respect to both the performance period and the dollar amounts being paid out. Allowing either the performance period to expire or the dollar amount to be exceeded, creates an unauthorized commitment of government funds that will require ratification, and that could result in the attorney being personally responsible for the unauthorized expenditure. (To extend time of performance or increase the authorized dollar amount, see Section 8, Modifying the Contract.)

*Performance period.* Each contract has a date on which it starts and a date by which it must be completed, a time frame referred to as the "period of performance" on the Form OBD-47. The contract authorizes payment for services only between these dates. If the contract

completion date needs to be extended, the trial attorney must notify the contracting officer so that the contract can be modified *before* the date passes.

*Dollar amounts.* Expenses are authorized only up to the dollar figure stated on the Form OBD-47. If additional funding is required to complete the job, the trial attorney must notify the contracting officer so that the contract can be modified *before the authorized dollar amount is exceeded*.

*Expert's timely submission of invoices.* The expert is required to submit invoices no later than 30 days after performance of services. It is the trial attorney's responsibility to make sure that the expert submits invoices timely. Once the expert has sent in the first invoice, TaxDoc has been programmed to send reminder to the trial attorney and section front office staff if subsequent invoices are not received on monthly intervals.

*Monitoring expert witness contracts on TaxDoc.* TaxDoc contains a variety of information about experts which trial attorneys can access and which can be useful in monitoring the contract. The screen shot below shows the information that appears when the "Expert Contracts" tab is clicked: the expert's name, authorized contract amount, contract start and end dates, days remaining on the contract, amounts paid under the contract, and the status of a proposed contract in the contract approval process.

CMN	Case Name	Expert	Yregdoc	Latest Mod	Authorized Amt	FMIS Paid Amt	FMIS Paid %	FMIS Obligated Amt	Start Dt	End Dt	Days Remain	Point of Contact
2000100019	Baxter Industries, Inc. 1	ALTA GROUP	061251666	0	\$11,000.00	\$0.00	0.00		01/10/2005	02/15/2005	0	Lewis, Se
2000100062	Appleby, Jack 10	Big Financial Co (Benjamin Lubin)	50113504	1	\$37,000.00	\$0.00	0.00		12/21/2004	03/31/2005	0	Nort, Lili
2000100064	Appleby, Jack 12	Big Financial Co (Benjamin Lubin)	5015001	0	\$25,000.00	\$0.00	0.00		01/01/2005	02/25/2005	0	Lewis, Se

Point of Contact	Expert	Mod	YRegDoc	Status	Status Dt	Authorized Amt	Start Dt	End Dt	Request Amt
Nort, Lili	Big Financial Co (Benjar	1	50113504	Awarded	12/17/2004	\$2,000.00	12/21/2004	01/15/2005	\$2,000.00
Miller, Julia	Big Financial Co (Benjar	0	50113504	Awarded	12/16/2004	\$35,000.00	12/22/2004	03/31/2005	\$35,000.00
						\$37,000.00			

Expert	Invoice Nbr	Invoice Amt	Pay Date	Pay Amt	Bar Code	Voucher Nbr	YRegDoc
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The “Status” column contains the current status of the contract. The possible status of a contract includes the following:

Pending in Budget  
Approved by Budget  
Awaiting DAAG Decision  
Pending in Procurement  
Awaiting JMD Decision  
Received from JMD  
Awarded  
Closed

The following TaxDoc screen will display when you click the “View Contract” icon:

Expert Witness Contract Mod (OBD47MOD) - View

PO/Contract#: 5-W-TAX-13504 Fund FY: 2005 Yregdoc: 50113504 Mod #: 1

3. Point of Contact: Nort, Lilli Section/Phone: CAT 202-555-1387 Effective Dt: 12/17/2004

6. Case CMN: 2000100062 Case Name: Appleby, Jack 10 DJ Number: 5-28-2917

7. Contractor: Big Financial Co (Benjamin Lubin) TIN: 511-22-4563

8a. Service Type: Expert Witness City State Code: 05 12341 DUNS: 11-234

8b. Perform. From: 12/21/2004 8b. Perform. To: 01/15/2005 8c. Est. Cost: \$2,000.00

9. Desc of Mod:

10a. Auth. Amt: \$2,000.00 10c. Cost Center: 03619601 10d. OBL Mo: 0412 10e. SOC: 1157

Event	Activity Date	Staff	Comment
Warning for Contract with Critical Days.	05/03/2007		Message Subject Line: Critical Status of Expert Contract for Case 'Appleby, Jack 10 (2000100062)'; DJ# 5-28-2917; Vendor 'Big Financial Co (Benjamin Lubin)'; YRegDoc 50113504 Mod 1.. Message: Warning - This is to notify you that the expert contract referenced in the Subject Line is already expired unless you submit a modification request immediately. This includes contracts for which no additional funding is required. TaxDoc shows the following: Amount Obligated: Remaining Balance: \$0.00 If you have a question, please contact Sam Moore at Extension 40705.

Contract Awarded 12/17/2004 Tran, Mai

**Trial attorneys, and other front office staff as directed by the section chief, should regularly review TaxDoc to verify the status of pending expert witness contracts and to ensure that a sufficient number of days and amount of funds remain to allow the contract**

**to be completed within the allotted time and budget.** Regularly checking the status of the contract prevents unnecessary or last-minute modifications.

Section chiefs, trial attorneys, and office managers also receive periodic email notifications generated by TaxDoc. Email notifications are sent whenever a contract has moved to the next step in the approval process, such as being “forwarded to the DAAG” for approval or being “awarded.” In addition, each Friday, TaxDoc generates emails notifying staff of those contracts on which sixty percent of the awarded funds have been used or on which the contract expires within sixty days. Finally, as noted above, TaxDoc has been programmed to send the trial attorney and section front office staff reminders if invoices are not received at monthly intervals. These notification emails are not meant as a substitute for checking TaxDoc regularly, however.

## **8. Modifying the Contract**

Despite an attorney’s best efforts at estimating the time and dollar requirements for an expert contract, modifications may be necessary. As described above, an expert witness contract can expire in either of two ways: (1) the period of performance expires, or (2) all of the money is spent. *After a contract expires, it cannot be modified; a whole new contract must be sought, and any work performed by the expert after the contract expires is subject to ratification.* Since modifications take time to process, it is important to begin the process sufficiently in advance to preclude a lapse in funding.

Forms required to modify a contract:

1. **Form OBD-47 (MOD).** This form is similar to the Form OBD-47 used in the original contract. State the requested changes to the contract in items 8, 9, and 11. OMA will complete Item 10. The following table lists information that trial attorneys may find helpful in completing the form.

<b>Item</b>	<b>Instructions for Form OBD-47 (MOD)</b>
8.a. Type of Service	List the type of service purchased with the original contract.
8.b. Performance Period.	List the beginning date of the original contract (item 21.c. of Form OBD-47) and the date by which you expect the expert’s work to be completed. If the time period of the original contract will not change, place “N/A” in this item.
8.c. Estimated Cost	State the amount of money to add to the contract amount. If only the time period of the contract is being modified, place a “\$0” or N/A in this item.

8.d. Modification Number	Leave blank. (OMA will complete.)
8.e. Effective date	Leave blank. (OMA will complete.)
9. Description of Modification	State the modification to the contract. Additional documents may be required. See the discussion following this table.
11.a. Current Contract	In the Performance Dates column, list the beginning and ending dates of the original contract (including any extension(s) obtained by any approved prior modification(s)). In the Amount column, list the total dollars approved to date (including any increases obtained by any approved prior modification(s)).
11.b. This Modification	In the Performance Dates column, list the dates of the contract including this modification. The beginning date is the same as the beginning date in item 11.a., and the ending date is the date by which you expect the expert's work to be completed. In the Amount column, list the dollar amount requested in this modification. (If only the time is being extended, the dollar amount is \$0.)

2. **Additional documentation as appropriate.** The modification package must accomplish two goals: (1) create a contract modification that binds the expert, and (2) explain why the original estimates of time and/or dollars are now inadequate. When additional funds are being added to perform similar work, or when the time needs to be extended because the trial date has changed, a statement entered in item 9 of the OBD-47 (MOD) would likely be sufficient (*i.e.*, "The trial was continued to 6/1/05 and the contract is accordingly extended to 7/1/05."). If the original contract underestimated the amount of work required, that should be explained fully. If the modification will significantly or substantially change the work required by the expert, an amended Statement of Work or an amended Justification may be appropriate.

## 9. Deposing Opposition Experts

Where each side intends to take the deposition of the other side's expert, the trial attorney should attempt to stipulate with opposing counsel that each side will pay its own expert fees and



travel expenses.<sup>10</sup> Failing that, the trial attorney should ensure that any agreement to pay the other side's expert (plus, if necessary, travel time and expenses, in accordance with federal travel regulations) is reduced to writing.

There are competing lines of authority on whether a party must pay for an opposing expert's preparation time, including time reviewing the deposition transcript.<sup>11</sup> Unless there is existing authority in a particular jurisdiction, it is the Division's policy to pay only for the opposing expert's actual deposition time, plus travel time and expenses (if the attorney cannot arrange for the deposition to be conducted at a place where the expert will have no significant travel time). If existing authority permits payment for the expert's time in preparing for the deposition, the written agreement should expressly state that preparation time is included. The trial attorney should nevertheless ensure that the agreement provides that the expert is to be compensated only for a reasonable time.<sup>12</sup> The trial attorney should be prepared to move the court for a protective order if agreement cannot be reached on these issues.

If the Government is required to pay expert witness fees for the deposition of the opposition's expert, authorization similar to retaining an expert must be obtained, by completing and forwarding to OMA a separate Form OBD-47 (which should not be signed by the opposing expert).

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<sup>10</sup> While Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure requires that the court order each party seeking discovery from the opponent's expert to pay the expert's fee, Rule 29 clearly permits the parties to modify that procedure by stipulation.

<sup>11</sup> Compare *New York v. Solvent Chem. Co.*, 210 F.R.D. 462, 471 (W.D.N.Y. 2002) (noting that "district courts in the Second Circuit have consistently held that time spent by an expert preparing for a deposition is compensable under Rule 26(b)(4)(C)") with *Benjamin v. Gloz*, 130 F.R.D. 455, 457 (D. Colo. 1990) (holding that party was not required to compensate opposing party for time expert spent preparing for his deposition); *Rhee v. Witco Chem. Corp.*, 126 F.R.D. 45 (N.D. Ill. 1989) (holding that party generally need not compensate opposing party's expert for time spent "preparing" for deposition, since "[a]n expert's deposition is in part a dress rehearsal for his testimony at trial and thus his preparation is part of trial preparation[,] but noting that "[t]here may be some cases where compensation of an expert for time spent preparing for a deposition is appropriate"); and *Brew v. Ferraro*, 1998 WL 34058048, at \*2 (D.N.H. 1998) (holding that party taking the deposition of an expert witness is generally not required to pay for expert's preparation time, but that an exception exists for complex cases in which extensive preparation is necessary).

<sup>12</sup> See, e.g., *Underhill Inv. Corp. v. Fixed Income Discount Advisory Co.*, 540 F. Supp. 2d 528, 539-40 (D. Del. 2008) (finding that expert's expenditure of 19 hours to prepare for four-hour deposition covering nine-page expert report that was issued only three weeks earlier was excessive, as was expert's expenditure of six hours to review 132-page deposition transcript); *Packer v. SN Servicing Corp.*, 253 F.R.D. 39 (D. Conn. 2007) (holding that party should be compensated for the reasonable time spent by expert in preparing for deposition, but such time should not exceed duration of deposition itself).

Form OBD-47	Complete Part I, checking box 13b (“Deposition conducted by DOJ attorney”). Estimated hourly expenses for the deposition should be placed in item 14d. Per diem expenses for meals (item 14f) should be requested only if the opposing expert is required to incur lodging expenses. Travel expenses may be reimbursed only in accordance with federal travel regulations.
Memo to Chief	Prepare a memo to your section chief, stating whether the opposing party is deposing the Government’s expert, and whether the parties attempted to negotiate an agreement and stipulation under which each side would bear the costs for the opposing side’s deposition of its expert(s).

It is an appropriate use of expert witness funds to pay for the Tax Division’s expert to attend a discovery deposition of the other party’s expert, when the purpose is to assist the Division’s expert in preparing for his own testimony (as opposed to assisting the trial attorney on more general aspects or strategies of the litigation).

## **10. Handling Invoices**

To facilitate payments on the contract, experts are to submit all invoices to Finance, P.O. Box 7148, Washington, DC 20044 (the address contained in block 15 of the OBD-47). OMA reviews the invoices for accuracy, ensuring that the invoice is dated and contains:

- case name and CMN number
- contractor’s name and taxpayer identification number
- date or time period over which the services were rendered
- description, itemization, and price for all services rendered
- attached receipts for any expenses claimed
- accurate rates for any per diem requests
- compliance with federal travel regulations
- rates that match what is contained in the contract
- name, telephone number, and complete mailing address of person to whom payment is to be sent

If any of these items are missing or incomplete, OMA will notify the expert directly. When all of the documentation and information are complete, the invoice will be sent to the section office manager to obtain the trial attorney’s signature.

After receiving the invoice, the trial attorney should promptly review it for accuracy, notate the invoice “okay to pay,” initial and date it, and return it to OMA for payment.<sup>13</sup> Finance checks the invoice for technical accuracy (as described above) only; *the trial attorney’s initials and notation on the invoice signify that the services provided are acceptable to the Government.*

## **11. The Ratification Process**

If an expert perform works prior to any contract being authorized, or continues to work after the contract has expired (either because the performance period has expired or the allocated funds have been exceeded), an unauthorized commitment has occurred. An unauthorized commitment is subject to the ratification process, which requires the person responsible for the unauthorized commitment to document how the unauthorized commitment occurred. Both the Justice Management Division’s (JMD) Procurement Services Staff and its Office of General Counsel review all contract ratification requests, in order to verify, after the fact, that the expenditure would have been proper had a contract been in place. The Division’s OMA staff will submit all contract ratification requests to the OAAG before requesting JMD review.

It may take several months for JMD to complete the ratification process, during which time the expert will not be paid for any unauthorized work performed. If JMD determines that the action is not subject to ratification, the person(s) who made the unauthorized commitment may be held personally liable to pay the expert.

## **12. Contract Closeout**

When work on a contract is complete and the final invoice has been approved for payment, the contract can be closed. This will free unexpended expert witness funds for expert services in other cases. To close a contract, the trial attorney should email OMA as soon as all work on a contract has been completed, stating that the contract is ready to be closed after all invoices have been paid. The email should contain the following information:

- Case name and CMN number
- Expert witness name
- YREGDOC number that appears on the contract

(The trial attorney will be able to use TaxDoc to automatically generate the email notification to OMA, when the latest upgrade to TaxDoc is released early in 2009.)

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<sup>13</sup> Processing invoices as quickly as possible is important because the Prompt Pay Act, 31 U.S.C. §§ 3901-3094, requires federal agencies to pay interest penalties if bills are not paid within 30 days. The 30-day period starts with the date that a complete and accurate invoice is first received in the Tax Division. Trial attorneys should also understand that OMA does not make the payment directly to the expert. After OMA subcertifies the signed invoice for payment, the invoice is sent to JMD, which certifies it and sends it to the Treasury for disbursement.

The OMA Budget and Finance staffs cannot close out a contract unless alerted by the trial attorney, because they are unable to independently monitor the status of any particular case.

## **12. OMA Contacts**

The following individuals in OMA can answer questions about the expert witness contract process:

- Submitting initial request package / payment of invoices  
[Tammarra Mitchell](#)  
Finance  
202-616-6470
- Authorization / procurement process / contract closings  
[Stephanie Yates](#)  
Warranted Contract Officer  
Procurement  
202-616-2507